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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIFTH APPELLATE DISTRICT

THE PEOPLE,

Plaintiff and Respondent,

v.

JEROME LEE CROSS,

Defendant and Appellant.

F057782

(Super. Ct. Nos. 07CM2731 and  
09CM0042)

**OPINION**

APPEAL from a judgment of the Superior Court of Kings County. Lynn C. Atkinson, Judge.

Gideon Margolis, under appointment by the Court of Appeal, for Defendant and Appellant.

Edmund G. Brown, Jr., Attorney General, Dane R. Gillette, Chief Assistant Attorney General, Michael P. Farrell, Senior Assistant Attorney General, and Julie A. Hokans, Deputy Attorney General, for Plaintiff and Respondent.

A jury convicted Jerome Lee Cross of: (1) stalking Varnetta Griggs between June 1, 2008, and January 7, 2009 (Pen. Code, § 646.9, subd. (a);<sup>1</sup> count 1); (2) making criminal threats against Varnetta Griggs and Rafael Pena on or about December 7, 2008 (§ 422; count 2); and (3) making criminal threats against Varnetta Griggs on or about January 7, 2009 (§ 422; count 3). In a bifurcated proceeding, the jury found true allegations that Cross suffered three prior convictions for which he served prison terms and failed to remain free of custody for five years after the prison terms concluded (§ 667.5, subd. (b)). The trial court sentenced Cross to state prison for five years and eight months, comprised of the three-year upper term for count 1, a consecutive eight-month term for count 2, and two years for the separate prior prison terms. The trial court imposed a concurrent three-year term for count 3.

On appeal, Cross contends the trial court erred when it allowed the prosecution to introduce evidence of a prior uncharged act under Evidence Code sections 1101 and 1108, and his sentence in count 3 must be stayed pursuant to section 654. As we shall explain, we find no error with respect to admission of evidence regarding his prior uncharged act, but conclude the sentence on count 3 must be stayed.

### **FACTS**

Varnetta Griggs, her fiancé, Rafael Pena, and her three children lived together in a single-story apartment located in a large apartment complex in Hanford. Cross lived in, or was a frequent visitor at, a second-story apartment located in a building across from Griggs's apartment. Griggs first noticed Cross in March or April 2008, when he said "stuff" either as he looked down from the second-story window or when he was in front of the staircase that led to his upstairs apartment. According to Griggs, she and Cross were not friends or romantically involved.

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<sup>1</sup> All further statutory references are to the Penal Code, unless otherwise stated.

The first time Cross spoke to Griggs was when she was taking groceries out of her car. He ran downstairs and asked if she needed help. She told him, “No, thank you, I got it.” He responded, “Hmm, okay.” Cross subsequently spoke to Griggs several times and she became familiar with his voice. Cross first said something troubling to Griggs around July 2008. She was taking the trash out around nightfall and walked by him as he sat in his apartment window. Cross said “I choose you.” As Griggs looked around, Cross said, “Yeah, you.” Griggs looked up; although she could barely see his face because it was dark, she recognized his voice and could see he was looking at her. She told him, “No, I don’t think so,” and that she was with someone. Cross responded, “Yeah someday you’ll see, watch.” Griggs “blew [the incident] off,” explaining that “guys say stuff to females all the time.” Griggs told her sister about the encounter, but not Pena or the apartment manager. Griggs did not find Cross attractive and his comment made her feel “kind of creepy.”

Griggs’s next contact with Cross occurred in the summer of 2008, when she was in her fenced patio with her sister and two of her children. She saw Cross standing in the branches of a nearby cherry tree; he was staring into her backyard and looking at her. Griggs said “What the hell” and took her children inside, but did not communicate with Cross. Because Pena also had seen Cross looking into the backyard from a window, Pena hung some tarps and blinds to block Cross’s view. Griggs was “pretty mad” and felt that Cross’s conduct was an invasion of her privacy.

On an afternoon around November 20, 2008, Griggs was outside washing her car when she heard Cross say, as he sat at his upstairs window, “Beauty is only skin deep.” After hearing the same comment again, she looked up at the window and saw Cross looking at her. Cross said “lesson learned.” Griggs, mad and disgusted, dropped the hose and went inside her apartment, where she told Pena what happened. According to Griggs, Pena was upset. Pena went outside and said “[w]hat’s up fool” to Cross, which is how he says hello.

Cross responded that he didn't say anything to "your girl," or that he was not trying to talk to her. Pena spat on the ground, pulled the hose into the patio, and went back inside.

Griggs's next contact with Cross occurred on the morning of December 7, 2008. She was in her kitchen with her three children when she heard a loud banging on the door. When Pena opened the door, Cross was standing there. He started rambling. Cross asked Pena if he knew what "this is." Pena said he didn't know what Cross was talking about. Cross, who seemed angry, said "[t]his is death at your doorstep" three or four times, gesturing with his left hand while his right hand was behind his back. At some point, Cross brought his right hand out from behind his back, backed up a bit and said "[c]ome on mother fucker, come here, come on out here." In his right hand was a gun wrapped tightly in a rag; Cross brought the gun up from his side and pointed it at Pena. Griggs heard Cross say "I don't have a problem with your girl," "come on motherfucker," and "death is at your doorstep." Thinking his and his family's lives were in danger and concerned for their safety, Pena slammed the door closed. Griggs was scared because she thought Cross was threatening her and her family, so she called the police. According to Griggs, the police told her there was nothing they could do about Cross's behavior and advised her to get a restraining order.

A week or so later, Pena left his apartment to drive to the corner store around 11:00 p.m. As Pena was walking out to his car, he encountered Cross, who was standing in the middle of the walkway staring into a neighbor's window while holding a beer bottle. Pena tried to walk around Cross, but he stepped into Pena's path. They said "[w]hat's up fool" to each other and stared at each other. Pena kept going. When Pena returned from the store, Cross, who was crouched down behind a tree near Pena's apartment, "sprang out" at Pena as he neared his apartment door and said "Why don't we settle this like men and go down to the park." Pena laughed and went inside. Pena thought about the gun Cross had pointed at him and was a bit scared.

Griggs was frightened of Cross. She began carrying mace and had Pena escort her to her car in the morning. She put sticks in the windows, which she kept locked. She started sleeping in a room with all three of her children, while Pena slept on the couch; they kept all of the apartment's lights on so Cross could not hide somewhere. Cross frequently said "something bad" or made "like noises" when Griggs and Pena left their apartment.

At about 6:30 a.m. on January 7, 2009, Griggs left her apartment to drive to the college she was attending. Griggs was walking alone to her car, unescorted by Pena, when she saw Cross "crouched down" in the flower bed underneath the window to her daughter's bedroom. She asked Cross what he was doing there. Cross got up and started walking toward her. He said "I am going to fuck you." Griggs, who was shocked and scared and thought she was going to be raped, began walking back to her apartment. Cross followed her as he kept telling her he was going to fuck her. Although it was a cold morning, Cross was wearing a light jacket with no shirt underneath; the top button on his pants was unbuttoned and his belt undone. Cross said, "[y]ou know you want this." Griggs responded to leave her "the fuck alone." Pena heard Griggs arguing so he ran outside. He saw Griggs walking backward away from Cross as Cross walked toward Griggs. Pena heard Cross say he was going to fuck Griggs. Pena put his arm around Griggs and took her inside the apartment, where Griggs called the police, who came and spoke to Cross. Griggs went to school. After returning home around 11:00 a.m., she saw Cross sitting on the stairs leading to his apartment. She drove to the police station and made a statement. On January 16, 2009, she was issued a three-year restraining order against Cross.

Griggs called the apartment complex's manager, Bill Badertscher, in December 2008. As a result of that call, Badertscher went to the complex to talk to Cross about an incident involving a B.B. gun. Cross told Badertscher he felt he was being disrespected and he wanted to back Pena off, so he took a B.B. gun, which he said looked real, and showed it to Pena. This was the first time Griggs contacted Badertscher about a problem with Cross.

Hanford Police Officer Dale Williams was dispatched to Griggs's residence at 7:13 a.m. on December 7, 2008. Williams spoke with Pena and then with Cross. Cross admitted to Williams that he had been at Griggs's apartment that morning and had made contact with Pena. Cross denied pointing a gun at Pena, but admitted having an unloaded pellet gun that he had pointed at the ground. Cross allowed Williams to go into his bedroom and retrieve the gun, which was wrapped in a blue bandana that concealed everything except the handle and the barrel tip. Williams did not know at first glance that it was a B.B. gun and agreed the gun was relatively realistic looking for a pellet gun. Cross told Williams Griggs was trying to get at him and all he had told her was that "beauty [is] more than skin deep." Williams cited Cross for brandishing a gun.

Late on November 20, 2006, Patty Granthem went to a Hanford convenience store with her boyfriend. As she entered the store, Cross came in behind her making cat calls and whistling. He also made comments such as "looking fine" and "nice ass." Cross, who appeared intoxicated, followed her as she walked to the beer case, making the same comments. Her boyfriend told Cross to stop and Cross eventually "backed off a little bit." As her boyfriend went down another aisle, Cross came around and, while continuing with his comments, touched Granthem on her upper back and slid his hand down to her buttocks. Granthem called the police, who came, took a report, and detained Cross. Granthem was shocked and felt violated. Granthem had not seen Cross either before or after this incident.

### ***Defense***

Terry Thompson, who had known Cross for 15 years and been his girlfriend "off and on" during that time, saw Cross nearly every day while he lived in Griggs's apartment complex and stayed there with him. According to Thompson, Cross had a good relationship with many of the neighbors and had a lot of friends in the area, and she never saw him have problems with anyone. She was aware of who Griggs and Pena were, but had never seen Cross have contact with either of them. Cross socialized a lot outside his apartment and

would be outside in front of his apartment building with his daughter. Thompson had stopped talking to Cross and going to his apartment from November 2008 until the first week of January 2009, when his mother died, and admitted she would not know anything about whether Cross engaged in a pattern of stalking, harassing or threatening his neighbors during that time. She believed she was at Cross's apartment the morning of January 7, 2009, but she did not know if anything occurred that day because she was sleeping.

Cross's 18-year-old daughter, Sharmone Cross, started living with Cross and her four-year-old sister in April 2008. She was familiar with Griggs and Pena, but did not know them by name, and the only contact she saw between Griggs and Cross was once when Griggs invited Cross's younger daughter to swim.

## **DISCUSSION**

### **I. Admission of Prior Uncharged Acts**

Cross contends the trial court erred when it permitted the prosecution to present Granthem's testimony regarding the November 2006 incident in the convenience store. We disagree.

#### **A. Trial Proceedings**

Before trial, the prosecutor filed an in limine motion seeking to admit Granthem's testimony regarding the November 2006 incident involving Cross. The prosecutor contended the testimony was admissible under Evidence Code section 1101, subdivision (b), because Cross's statements to police, the apartment manager, and Pena showed that Cross believed Griggs had initiated the "sexual conduct that had occurred," and the 2006 incident would controvert any claim by Cross that Griggs consented to or sought out the sexual contact, negate any defense involving mistake or accident, and prove Cross's intent and knowledge of his actions. The prosecutor further contended the testimony was admissible under Evidence Code section 1108, because the 2006 incident involved a sexual offense, namely a violation of section 243.4, and the currently charged conduct fell within Evidence

Code section 1108's definition of sexual offense, since the ongoing harassment of Griggs was of a sexual nature the harassment "related to many of the manners in which the term sexual offense is defined," and Cross had stated he intended to forcibly fornicate with Griggs.

Outside the jury's presence immediately before Granthem's testimony, the court allowed the parties to place on the record the court's ruling on the in limine motion. Defense counsel objected to the prosecutor's request to admit "1101 evidence." Defense counsel stated she did not think the prosecution maintained both crimes were of a sexual nature, and therefore if the evidence came in, it would be under Evidence Code section 1101, subdivision (b). She asserted the testimony should not be admitted on that basis because the prior act involved touching of a sexual nature, while the current charges were not "of a touching type nature," and the testimony would be unduly prejudicial under Evidence Code section 352. The prosecutor argued the testimony was admissible under Evidence Code section 1101, explaining the court had indicated tentatively in chambers that while the prior act included touching it also included comments of a sexual nature, which is the "exact same thing we have with the stalking here," as it was a sexual stalking over a period of months. The prosecutor asserted that because of those similarities, it was appropriate "1101 evidence" and could be used to show intent.

The court stated the matter had been discussed "somewhat in chambers" and ruled the testimony was "admissible for the limited purpose of evidence toward either lack of mistake or accident or consent or intent." The court admitted the testimony for "that limited purpose as to the stalking issue, not the section 422." Subsequently, the court instructed the jury, pursuant to CALCRIM No. 375, that it could consider the evidence that Cross sexually assaulted Granthem only if the People had proven by a preponderance of the evidence that Cross had committed the act and, if the jury so found, it may, but was not required to, consider the evidence for the limited purpose of deciding whether Cross "acted with the

intent to maliciously annoy or harass Varnetta Griggs or [Cross]’s alleged actions were the result of the state of [mistake or accident], or [Cross] reasonably and in good faith believed that Varnetta Griggs consented.”

## **B. Analysis**

Cross contends the trial court erred when it admitted Granthem’s testimony because (1) it was improper character evidence under Evidence Code section 1101, subdivision (b); (2) it was not admissible under Evidence Code section 1108; and (3) even if admissible, its probative value was outweighed by a danger of undue prejudice.

Character evidence is generally inadmissible when offered to prove conduct on a specific occasion. (Evid. Code, § 1101, subd. (a).) This rule, however, “does not prohibit admission of evidence of uncharged misconduct when such evidence is relevant to establish some fact other than the person’s character or disposition.” (*People v. Ewoldt* (1994) 7 Cal.4th 380, 393.) Evidence Code section 1101, subdivision (b), specifies that evidence of other misconduct is admissible when relevant to prove such issues as intent, motive, knowledge, identity, or common plan or design. (*People v. Kipp* (1998) 18 Cal.4th 349, 369.) “Evidence of uncharged crimes is admissible to prove identity, common design or plan, or intent only if the charged and uncharged crimes are sufficiently similar to support a rational inference of identity, common design or plan, or intent.” (*People v. Kipp, supra*, 18 Cal.4th at p. 369.) “On appeal, the trial court’s determination of this issue, being essentially a determination of relevance, is reviewed for abuse of discretion.” (*Ibid.*) Under an abuse of discretion standard, a trial court’s ruling will not be disturbed, and reversal of the judgment is not required, unless the trial court exercised its discretion in an arbitrary, capricious, or patently absurd manner that resulted in a manifest miscarriage of justice. (*People v. Guerra* (2006) 37 Cal.4th 1067, 1113.)

We agree with the People that the evidence of Cross’s misconduct was properly admitted under Evidence Code section 1101, subdivision (b), to show intent. Section 646.9,

subdivision (a), requires the prosecution to prove the defendant “willfully, maliciously and repeatedly follow[ed] or willfully and maliciously harass[ed]” another person and made a credible threat “with the intent to place that person in reasonable fear for his or her safety, or the safety of his or her immediate family.” “Harasses” is defined as engaging “in a knowing and willful course of conduct directed at a specific person that seriously alarms, annoys, torments, or terrorizes the person, and that serves no legitimate purpose.” (§ 646.9, subd. (e).) Thus, the prosecution here was required to prove that Cross engaged in a knowing and willful course of conduct directed at Griggs that seriously alarmed, annoyed, tormented or terrorized her. The November 2006 incident involving Granthem was relevant to this issue because it showed that, due to Granthem’s reaction to his following her, making sexually suggestive comments, and touching her, namely calling the police, Cross knew this type of behavior was alarming and annoying. The evidence that Cross previously had engaged in harassing behavior showed that Cross did not act innocently when he harassed Griggs and that he knew both that a woman would not like such conduct and the conduct was unacceptable. Although Cross paints the November 2006 incident as merely constituting “socially improper conduct,” his conduct was much more than this, as he followed Granthem through the store, continued to make sexual comments despite being told to stop, and went so far as to touch Granthem.

Cross asserts his conduct in the November 2006 incident and the current case are too dissimilar to make the November 2006 incident probative of his intent, as in the 2006 incident Granthem was a stranger and he actually touched her, while in the current case Griggs was a neighbor and he never touched her. As the People point out, however, “[t]he least degree of similarity (between the uncharged act and the charged offense) is required in order to prove intent.” (*People v. Ewoldt, supra*, 7 Cal.4th at p. 402.) “[W]hen the other crime evidence is admitted solely for its relevance to the defendant’s intent, a *distinctive* similarity between the two crimes is often unnecessary for the other crime to be relevant.

Rather, if the other crime sheds great light on the defendant's intent at the time he committed that offense it may lead to a logical inference of his intent at the time he committed the charged offense if the circumstances of the two crimes are substantially similar even though not distinctive.'” (*People v. Demetrulias* (2006) 39 Cal.4th 1, 16-17.) While there were differences between the November 2006 incident and the charged crimes, they were sufficiently similar to show Cross's intent to harass. Both involved his attempt to seduce women with whom he had no prior relationship in a vulgar manner, despite the objections of their boyfriends.

Since Granthem's testimony regarding the November 2006 incident was admissible under Evidence Code section 1101, subdivision (b), we need not decide whether it also was admissible under Evidence Code section 1108, which allows the admission of an uncharged offense when both the charged and uncharged offenses are “sexual offenses” as defined in that statute.

We also reject Cross's assertion that Granthem's testimony should have been excluded because it was more prejudicial than probative. “The admission of relevant evidence will not offend due process unless the evidence is so prejudicial as to render the defendant's trial fundamentally unfair.” (*People v. Falsetta* (1999) 21 Cal.4th 903, 913 (*Falsetta*)). Evidence Code section 352 provides a safeguard against the possible undue prejudice arising from the admission of prior acts evidence by requiring the trial court to “engage in a careful weighing process” by considering such factors as the nature of the act, its relevance and reliability, possible remoteness, the likelihood of confusing, misleading, or distracting jurors, its similarity to the charged offense, the burden on the defendant in defending against the uncharged acts, and the availability of less prejudicial alternatives. (*Falsetta, supra*, 21 Cal.4th at pp. 916-917.)

We cannot conclude on the record before us that the trial court abused its discretion by admitting Granthem's testimony. “““The ‘prejudice’ referred to in Evidence Code

section 352 applies to evidence which uniquely tends to evoke an emotional bias against defendant as an individual and which has very little effect on the issues. In applying section 352, ‘prejudicial’ is not synonymous with ‘damaging.’””” ( *People v. Rucker* (2005) 126 Cal.App.4th 1107, 1119.) For the reasons outlined above, the challenged testimony had substantial probative value on the issue of Cross’s intent, which was a significant issue in the case. The November 2006 incident was relatively recent to the charged crimes and came from a source independent of the evidence concerning the charged offenses. The incident showed Cross has a propensity to use sexually suggestive comments in an attempt to seduce women despite objections by them or their boyfriends. Granthem’s testimony was not particularly inflammatory in comparison to the charged offenses. The evidence against Cross was strong even without the challenged testimony. Finally, the jury was given the appropriate limiting instruction on the use of this evidence to prevent any potential prejudice. We presume the jury followed this instruction. ( *People v. Gray* (2005) 37 Cal.4th 168, 217.)

## **II. Section 654**

Cross contends his concurrent sentence on count 3 should have been stayed pursuant to section 654 because the count 3 offense was incident to the same goal as the offenses in counts 1 and 2, namely to annoy Griggs and Pena, and there was no evidence he committed the acts in count 3 with a different intent and objective than those in counts 1 and 2. We agree with Cross.

Section 654 provides in part: “An act or omission that is punishable in different ways by different provisions of law shall be punished under the provision that provides for the longest potential term of imprisonment, *but in no case shall the act or omission be punished under more than one provision.*” (§ 654, subd. (a), italics added.) A course of conduct that constitutes an indivisible transaction violating more than a single statute cannot be subjected to multiple punishment. ( *People v. Butler* (1996) 43 Cal.App.4th 1224, 1248.)

“If all the offenses were incident to one objective, the defendant may be punished for any one of such offenses but not for more than one.” (*People v. Perez* (1979) 23 Cal.3d 545, 551.) If, on the other hand, “[the defendant] entertained multiple criminal objectives which were independent of and not merely incidental to each other, he may be punished for independent violations committed in pursuit of each objective even though the violations shared common acts or were parts of an otherwise indivisible course of conduct.” (*People v. Beamon* (1973) 8 Cal.3d 625, 639.)

Whether multiple convictions were part of an indivisible transaction is primarily a question of fact. (*People v. Avalos* (1996) 47 Cal.App.4th 1569, 1583.) We review such a finding under the substantial evidence test (*People v. Osband* (1996) 13 Cal.4th 622, 730-731); we consider the evidence in the light most favorable to respondent and presume the existence of every fact the trier could reasonably deduce from the evidence. (*People v. Holly* (1976) 62 Cal.App.3d 797, 803.) We must determine whether the violations were a means toward the objective of commission of the other. (*People v. Beamon, supra*, 8 Cal.3d at p. 639.)

In this case, Cross was convicted of stalking, which requires two or more acts of willful, malicious and repeated harassment or following of another person, occurring over a period of time, and a credible threat intended to place the other person in fear for his or her safety or that of his or her family. (See *People v. Ibarra* (2007) 156 Cal.App.4th 1174, 1195-1197, 1198; § 646.9.) A criminal threat, on the other hand, does not require a course of conduct but can occur by one discreet act. (*People v. Maciel* (2003) 113 Cal.App.4th 679, 682 [one element of offense is willful threat to commit a crime].)

At sentencing, the court announced its tentative decision to sentence Cross to the three-year upper term on count 1, and since it appeared that “Count III may be part of the rationale for ... Count I[,]” it would “be inclined to run the three year term on that one concurrent, and then notify the appellate court that in the event that it should have been

stayed, that that's what I would have done." The court then stated it would impose a consecutive eight-month sentence on count 2, since there was a separate victim and different occurrences. Defense counsel requested the terms on counts 2 and 3 both run concurrent to count 1, and submitted. The prosecutor submitted on the "654 issue on Count III[,]” explaining that she could understand the court's reasoning “given the nature of the testimony the Court heard.” The prosecutor agreed there was not necessarily a section 654 issue on count 2 because of the separate victim. The court ultimately sentenced Cross to the three-year upper term on count 1 and a concurrent three-year upper term on count 3, stating that “if there's a 654 issue the Court would -- has stated that I'm not sure there was, so I will not stay it at this point but simply run it concurrent.” The court imposed an additional consecutive eight-month term on count 2 after finding a consecutive term warranted due to the different victim and occurrence.

We interpret the trial court's statements as an implied finding that Cross's criminal threat in count 3, which was based on the January 7, 2009, incident where Cross approached Griggs in the early morning and said “I am going to fuck you,” had a purpose or goal identical to the stalking which occurred between June 1, 2008, and January 7, 2009. The record supports this finding. Both were for the purpose of harassing and frightening Griggs. Since the crimes do not share identical elements, convictions for both offenses are proper. Nevertheless, the requirements of section 654 prohibit punishment for both crimes if the intent and objective of making the threats and the stalking were the same. We conclude that they were and therefore section 654 is applicable.

The People argue that section 654 does not preclude concurrent sentences where, as here, the conduct is divisible in time, during which time period the defendant was capable of reflection, citing *People v. Felix* (2001) 92 Cal.App.4th 905 (*Felix*). There, the appellate court concluded the defendant could be punished for two criminal threats made on the same date but at different time and places, with the first threat directed at two victims and the

second exclusively against one, since the trial court reasonably could infer that because the defendant was angry, he intended the second threat to cause new emotional harm to the second victim. (*Felix, supra*, 92 Cal.App.4th at pp. 915-916.) But in *Felix*, the criminal acts were discreet and complete when committed. In the case before us, stalking requires a course of conduct over time, with multiple acts. Thus, stalking cannot be completed instantaneously but requires a period of time over which numerous, separate acts constituting the offense must occur.

### **DISPOSITION**

The judgment is corrected to modify the sentence to stay imposition of the sentence on count 3 pursuant to Penal Code section 654. As modified, the judgment is affirmed. The trial court is directed to prepare an amended abstract of judgment.

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Gomes, J.

WE CONCUR:

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Vartabedian, Acting P.J.

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Poochigian, J.